

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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EDWARD E. BRAMLETT, CHARLES R. BRAMLETT, GORDON  
F. HATCHER, E. DANA BROOKS, JULIUS GOLDFARB,  
MEYER GOLDFARB, V. R. JAMES and E. G. HEIDEN,  
*Appellants,*

*vs.*

NATIONAL UNIT CORPORATION, a corporation,  
*Appellee.*

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OPENING BRIEF FOR APPELLANTS.

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**OPENING BRIEF FOR APPELLANTS.**

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**Statement of Jurisdictional Facts.**

On this appeal, two cases are involved brought by National Unit Corporation for alleged infringement of claims 2 and 3 of patent No. 2,028,838 to Henry Kermin [R. 7, par. VIII, and 29, par. VIII], on a mayonnaise dispenser.

The District Court had jurisdiction under Judicial Code, section 48; 28 U. S. C., section 109.

Interlocutory Decrees were entered May 10, 1938.

The Interlocutory Decree is one case found that the defendants, Edward E. Bramlett, Charles R. Bramlett, Gordon F. Hatcher and E. Dana Brooks had infringed claims 2 and 3 of said Letters Patent by distributing and supplying for use, apparatus as exemplified by Plaintiff's Exhibit 7. [R. 22, par. 3.]

A similar decree was entered in the other case finding that the defendants Julius Goldfarb and Meyer Goldfarb had infringed by making, distributing and supplying for use, apparatus exemplified by Exhibit 7. [R. 49, par. 3.]

This appeal is prosecuted under Judicial Code, section 129, 28 U. S. C., section 227a.

### Statement of the Case.

The Kermin patent in suit [Ex. Bk. p. 1] relates to a container (the preferred form being capable of being destroyed after use), and to a dispensing means whereby the contents of the container may be discharged in increments without subjecting the containers to the action of the air or contamination from other sources. [Ex. Bk. p. 5, Col. 1, lines 1-6.]

The device in preferred form consists (1) of a truncated cone stand with a vertical opening extending the whole length of its side, and a horizontal rest spaced from the bottom, (2) a parchmented paper truncated cone container and (3) a pump attached to the smaller end of the container.

The container is inverted to pass through the top opening of the stand. The vertical opening of the stand accommodates the passage of the pump handle and allows a receptacle to be placed beneath the pump. When in place the weight of the container with its contents and pump is supported by the horizontal rest 3. This support also locks the container against movement at that point when the pump is used, while the top outwardly flared lip of the stand stabilizes the assembly above.

The defendants' device consists (1) of a truncated cone stand with a partial side opening without any horizontal or other rest below, (2) an inverted container of glass instead of the preferred composition described in the patent, and (3) a pump attached to the container. It is stabilized by a guide attached to the back of the stand into which the back end of the pump, slides vertically.

The prior art shows, in various combinations, stands supporting inverted containers with dispensing means attached.

The Oliphant patent, Ex. I-1 [Bk. Ex. p. 23] is the closest to the structures here involved, consisting (1) of a truncated cone shaped stand with a partial vertical opening in its side, (2) an inverted truncated cone shaped bottle or container and (3) a dispensing means attached to the container.

### The Claims in Issue.

Claims 2 and 3 in issue read as follows:

“2. An apparatus for storing and discharging mayonnaise and the like, comprising: a stand having an enlarged bottom and a restricted top, *a substantially vertical opening in the wall of said stand*, a container provided with an enlarged base and a restricted top portion having an opening therein, a feeding device removably attached to the top of said container, and *a restraining means within said stand adapted to engage with said feeding device* when said container and feeding device attached thereto is introduced in inverted position into the stand through said restricted top and vertical wall opening, *said container being stabilised by the top of said stand at a point between the top and base of said container.*”

“3. An apparatus for storing and discharging mayonnaise and the like, comprising: a stand having an enlarged bottom and a restricted top provided with an upwardly and outwardly flaring lip, *a substantially vertical opening in the wall of said stand*, a container provided with an enlarged base and a restricted top portion having an opening therein, a feeding device removably attached to the top of said container, and *a restraining means within said stand adapted to engage with said feeding device* when said container and feeding device attached thereto is introduced in inverted position into the stand through said restricted top and vertical wall opening, *said container being supported and stabilised by the outwardly flaring lip of said stand.*”



## Basis of Appeal.

1. That the claims of the patent in suit are invalid for anticipation and having no novelty or invention over the prior art, and because the structure, as claimed, lacks utility;

2. That the defendants' device does not infringe, in that their devices do not contain the vertical opening in the wall of the stand with a restraining means of the character called for by the patent; and they are not stabilized by the top of the stand at a point between the top and base of the container, but on the contrary are entirely supported there, and are stabilized by a separate device, which may be omitted and still leave a useful device.

3. No accounting should be demanded in view of the undisputed evidence that the stands are distributed without compensation and none of the defendants derive any direct profit therefrom, and there is no showing of any damage to plaintiff of a character recoverable in this action.

### Assignments of Error Relied Upon.

Assignments of Error 2, 3 and 8 are directed to invalidity of claims 2 and 3. [R. pp. 148, 149, 150.]

Assignments of Error 4, 5, 6 and 7 are directed to non-infringement. [R. pp. 149, 150.]

Assignment of Error 9 is directed to decreeing an accounting. [R. p. 150.]

## ARGUMENT.

### I.

Claims 2 and 3 Are Invalid for Anticipation, for Lack of Novelty and Invention Over the Prior Art, and for Lack of Utility.

#### 1. ANTICIPATION.

##### *Assignment of Error 2.*

“2. That the court erred in failing to adjudicate claims 2 and 3 of said Letters Patent are anticipated by the prior art, particularly the patents of Oliphant, No. 1,075,268, October 7, 1913, Exhibit I-1; Weatherhead, No. 1,161,557, November 23, 1915, Exhibit I-2; Griffith, No. 1,004,019, September 26, 1911, Exhibit I-3; Cordley, No. 1,260,335, March 26, 1918, Exhibit I-4; Coffin, No. 1,723,229, August 6, 1929, Exhibit I-5; Cox, No. 1,267,625, May 28, 1918, Exhibit I-6; Jacobson *et al.*, No. 1,787,785, Jan. 6, 1931, Exhibit I-7. Ex. A, 3 legged stand & pump for dispensing mayonnaise.”

The essential elements of plaintiff's combination are stated in the patent as follows:

“The essential elements of my combination are, a stand adapted to receive and hold a dispenser, together with a container which is also supported by said stand.” [Bk. Ex. p. 6, Col. 2, lines 16-20.]

All of the patents set out in the above quoted assignment of error 2 contain these essential elements, a stand adapted to receive and hold a dispenser, together with a container which is also supported by said stand.

Oliphant [Ex. Bk. p. 24] has the particular form of stand now sought to be monopolized by plaintiff, a truncated cone with a vertical opening in the side and an inverted, truncated cone container with dispensing means attached.

Jacobson supports his container at the top. [Ex. Bk. p. 62.]

Weatherhead [Ex. Bk. p. 28] and Cordley [Ex. Bk. p. 36] have 2 and 3 legged stands.

All the devices have “restraining means” in that they are held rigid by some means or other.

Griffith [Ex. Bk. p. 32] holds his bottle at the bottom like plaintiff with his rest 3, and stabilizes with the band S-1.

Cordley [Ex. Bk. p. 36] has part 41 attaching the dispenser to the frame.

Coffin [Ex. Bk. p. 46] screws his dispenser into the frame threaded collar 5.

In view of the prior art it only required mechanical adaptation of well known devices and no inventive genius to adopt from the prior art devices, the aggregation of which is now claimed by plaintiff as his invention.

In *Lincoln Engineering Co. of Illinois v. Stewart-Warner Corp.*, 302 U. S. 682, 82 L. Ed. ...., Adv. Ops. Oct. Term, 1937, 695, 697, the court said:

“A compressor or pump for propelling lubricant is old and unpatentable as such. The invention, if any,

which Butler made was an improvement in what he styles in his specification the 'chuck' and in his claim a 'coupling member.' It is not denied that multi-jawed chucks had been used in industry and as couplers in lubricating apparatus. Butler may have devised a patentable improvement in such a chuck in the respect that the multiple jaws in his device are closed over the nipple by the pressure of the grease, but we think he did no more than this.

As we said of Gullborg in the *Rogers* case, having hit upon this improvement he did not patent it as such but attempted to claim it in combination with other old elements which performed no new function in his claimed combination. The patent is therefore void as claiming more than the applicant invented.

The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention."

## 2. LACK OF NOVELTY AND INVENTION.

### *Assignment of Error 3.*

"3. The court erred in holding claims 2 and 3 of the patent in suit good and valid in law as not supported by the evidence and as contrary to law, in that said claims have no novelty over the prior art and do not constitute invention over the prior art."

Every feature of plaintiff's device appears in various forms in the prior art. The main elements appear in several. Any mechanic would have no difficulty in adapting these devices to meet any need that might arise because of the size of the container, or the character of the material to be handled. Any problem that might arise could be solved by an ordinary person and would not require inventive thought, or even more than quite ordinary mechanical skill.

In 1932, several years before plaintiff's patent application, a three-legged stand was devised by Mr. Sam Rubin, who used it in San Pedro himself to fill glasses. He used it for filling and especially for glasses, for mayonnaise. He put a funnel on top made of stainless steel which fitted on the open part on the top of the stand. [Tr. p. 138.] This stand with pump attached is Defendants' Exhibit A.

Mr. Goldfarb bought Exhibit A about 1933, the first part of 1933 and it was used until two years ago when the Goldfarbs put in an automatic filling machine. [Tr. p. 140.]

Mr. Goldfarb testified that Mr. Kermin (patentee herein) came down to their place of business while this Defendants' Exhibit A was in use. [Tr. pp. 139, 140.]

A photograph of this Exhibit A appears on the left hand side of picture No. 1 on the page opposite. It is the larger of the two three-legged stands appearing in that picture. The small right hand stand is the three-legged support adapted by patentee in 1935 as the rest 3 of his patent.

Picture No. 2 shows the function of patentee's three-legged stand, supporting a container with his dispensing means or pump.

The container of plaintiff is like the funnel or hopper used by Rubin and Goldfarb and others prior to plaintiff's conception.

Mr. Kermin says:

“The first idea was the container, a conical-shaped container that could be sealed at one end, and also be refilled at one end if necessary.” [Tr. p. 70.]

Later, in describing a hopper for distributing mayonnaise, he says:

“The container used was a hopper. The hopper was an inverted cone, something of that nature, like many hoppers are. We used something similar. The hopper was fastened to the dispensing machine.” [Tr. pp. 74-5.]

In other words, a conical shaped container that could be sealed at one end, such as he describes in his patent, is merely an inverted cone hopper like many hoppers are, sealed at one end. So the only additional feature that Kermin added to the hopper mayonnaise dispensing device, was surrounding the device in reduced size with an ornamental stand so that it might be placed upon a counter of a distributing concern.



1  
3 legged support of defendant 1933 (Tr.140) At right 3 legged support adapted by plaintiff 1935



2  
Plaintiff's 3 legged stand supporting weight of container and pump.



3  
Same as 2 with ornamental stand to stabilize and beautify the device.



4  
Plaintiff's assembly of support, pump, container and ornamental stand.



5  
Both assemblies. Defendant has no supporting stand, relying on closed top of surrounding stand to support weight.



6  
Illustration of inutility of plaintiff's device by omission of 3 legged support.





The device used by Mr. Sam Rubin as shown in picture No. 1, Defendants' Ex. A, has all the necessary features for dispensing mayonnaise, to-wit: a stand, a pump or feeding device and a container (not shown) consisting of a hopper in shape of an inverted cone, open at both ends.

Picture No. 4, opposite page 10, shows the plaintiff's complete assembly of support, pump, container and ornamental stand. At the right hand side is a picture of the stand alone, with horizontal rest within.

Mr. Kermin testified when asked as to his problems in making up a stand to hold the container with the dispenser attached, that he "naturally . . . had to cut a sort of opening or channel to allow the dispenser unit to go through." [Tr. p. 62.]

Upon cross-examination he testified:

“Q All you had to do was to put a support or brace across here to hold it solid, wasn't it?

A That would be a precaution.

Q So there wasn't any problem on that end?

A There wasn't any problem. We devised many different ways of doing that. We had other things to consider.

Q To take this method of attachment: You have seen lots of glass jars with similar contrivances, haven't you, where you can screw it on?

A Yes, there are lots of them on the market.”  
[Tr. p. 83.]

“Q Wasn't your difficulty in getting your threaded portion onto the top?

A My first idea was to use metal, so I didn't run into any difficulty until I decided that paper would be the better means.

. . . . .

Q You didn't use a glass container until after Goldfarb came on the market with his, did you?

A I first rejected it and then used it. I am rejecting it right now, and we are getting away from glass again.

Q You didn't begin to use the black dispensing means, that is, the pump of this black material, until after you had seen his, did you?

A That was our first experiment, with the black, and we rejected it because of the odor of the material, and until they developed the material and recommended it.

Q But you used white?

A Yes. That would be better looking.

Q You use black now?

A Yes.

Q When did you take it on? After Goldfarb, wasn't it? After Goldfarb showed it could be used, then you adopted it?

A Yes, I am a copy cat, I guess." [Tr. pp. 84, 85.]

. . . . .

"The first time I used a glass container was in the early part of 1937 I believe." [Tr. p. 71.]

One reason for using a supporting means, the three-legged stand 7, at the bottom of the conical stand, is on account of the character of the material of which the container is to be made, being preferably of parchmented paper or waterproof board.

The patent reads:

“The container 42 is preferably of parchmented paper or waterproofed board and is conical in form. The base of the container may be formed of a fiber-board disc 43 provided with a beveled edge, said disc being inserted into the base of the cone and stapled thereto as indicated at 44. If desired, an insoluble adhesive may also be used.” [Bk. Ex. p. 6, Col. 1, lines 34-40.]

In view of the prior practice of supporting an inverted container with dispenser on a three-legged stand and of the Oliphant patent with a conical stand with vertical opening, there was no invention or novelty in plaintiff's patent.

*Pennington et al. v. National Supply Co.*, 5 Cir., 95 Fed. 2d. 291 holds:

“The size and location of a receptacle for a free running lubricant in a rotary drilling rig for oil and other deep well drilling is a matter involving mechanical skill at most, and invention could not reside in increase in capacity or change in location, where system of lubrication remained essentially the same as in inventor's modification of existing machine.” (Headnote 5.)

### 3. LACK OF UTILITY.

#### *Assignment of Error 8.*

“8. That the court erred in failing to find that claims 2 and 3 construed to include a restraining means with the single function of restraining the device against movement when operating the pump

is without utility in that the claims lack means to support the weight of the container when inserted in inverted position, in that a device constructed according to the language of the claims would permit the container to fall through the vertical opening in the wall of the stand.”

The 6th picture opposite page 10, illustrates the inutility of plaintiff's device when omitting the three-legged support. A glass container has been put in the opening of the metal stand, which is open down the front, allowing this container to fall through unless some other means is used to hold it in place.

Unless claim 2 in describing “a restraining means within said stand adapted to engage with said feeding device when said container and feeding device attached thereto is introduced in inverted position into the stand through said restricted top and vertical wall opening” intends to cover a restraining means of the character described in the patent to support the major portion of the weight of the container and pump, there is not sufficient support for said container and pump and the device lacks utility. The same is true of claim 3. With a substantially vertical opening in the wall of the stand, there must be something to prevent the container from forcing its way out thru the opening when weighted by the mayonnaise and the pump attached.

II.

Defendants Do Not Infringe.

*Assignment of Errors 4, 5, 6, and 7.*

“4. The court erred in finding that within six years last past or at any time, the defendants or any of them were engaged in the manufacture or distribution for use of apparatus exemplified by Plaintiff’s Exhibit 7; said apparatus including a stand, a container supported on the stand, a feeding device connected to the container and a restraining means cooperating with the feeding device.”

“5. The court erred in failing to find that the devices manufactured and distributed by defendants do not contain the element claimed in claims 2 and 3 designated as ‘a restraining means within said stand adapted to engage with said feeding device when said container and feeding device attached thereto is introduced in inverted position into the stand.’”

“6. The court erred in failing to find that the defendants’ structure does not contain or incorporate the elements of claim 2 nor the mechanical equivalent thereof described in the claim as follows: ‘said container being stabilized by the top of said stand at a point between the top and base of said container.’”

“7. That the court erred in failing to find that the defendants’ device does not contain the element described in claim 3 as follows: ‘Said container being supported and stabilized by the outwardly flaring lip of said stand.’”

In the finding of infringement, the apparatus is described as “a stand, a container supported on the stand, a feeding device connected to the container and a restrain-

ing means co-operating with the feeding device.” Assignment of error 4 is directed to this finding. It is too broad. The prior art discloses several devices having this complete combination.

*Ex. A* shows the stand upon which a container was supported, and a feeding device connected to the container and a restraining means co-operating with the feeding device. The vertical pump is attached to the stand and thus restrained the same as in plaintiff’s patent.

*Griffith*, Ex. I-3 [Bk. Ex. p. 32] has a stand, container and dispenser held at the bottom and thus restrained, the same as plaintiff.

*Cordley*, Ex. I-4 [Bk. Ex. p. 36] has a stand, container and dispenser attached to the frame and thus restrained.

*Coffin*, Ex. I-5 [Bk. Ex. p. 46] has a stand, container and dispenser screwed into collar of the stand which has the container screwed in above.

*Cox*, Ex. I-6 [Bk. Ex. p. 56] has the three elements with restraining means bolted to the stand.

In view of the prior art, the patent must be considered of narrow scope and confined to the specific device described in the claims.

The specific features by which defendants’ device is distinguished from the plaintiff’s combination are (1) it has no vertical opening in the side of the stand,—the partial opening in the lower part of the wall of defendants’ stand is the same as in the Oliphant patent [Ex. Bk. 23]; (2) there is no “restraining means” of the particular type described in plaintiff’s patent; (3) the stabilizing means of defendants is the back guide instead of the top of the stand as called for in plaintiff’s claims.

1. THE VERTICAL OPENING IN THE WALL OF THE STAND  
IS NOT IN DEFENDANTS' DEVICE.

One of the features of both the claims in issue is the vertical opening running from top to bottom of the metal ornamental stand.

The effect of the vertical opening in the plaintiff's device is so to weaken the structure as to require the horizontal rest to carry the weight of the container and stiffen the structure. Without the horizontal rest the effect of plaintiff's vertical opening under the pressure of the container with the material weighting it, would be to cause a distortion and a spreading of the stand, allowing the container to pass through and fall down.

Where the container is made of parchmented paper, conical in form, as specified in the patent, it is not desirable to put any pressure against the sides of the container for fear of collapsing it. Hence the horizontal support of plaintiff is put underneath the pump. The top of the stand supports a very small part of the weight and prevents the stand from wobbling by holding it in balanced condition.

Where a glass container is used, no such construction is necessary, as the glass container is very strong and may be entirely supported by the ring or flare at the top of the metal stand.

Defendants follow the teaching of the Oliphant patent, which it has modified only to an extent which would not constitute invention, providing means for the passage of the projecting part of the pump in that portion of the wall of the support above the opening at one side, and a guide means to stabilize the structure when pumping.

Mr. Schneider testified for defendants:

“We made our stand in the shape it is to balance it. We had to keep in mind that we had to get something out that would look pretty nice for display purposes, and as long as we were having a bottle of that shape we arrived at something similar to that, so that it would balance it. The stand is practically a reversal of the glass jar, with a few different changes it is practically a duplicate of the jar itself.” [Tr. p. 104.]

The defendants' channel at the top of the stand is not an opening in the outer wall, but is a part of the outer wall of the stand, in order to make a complete closure of the wall at the top for the support of the glass container.

Defendants' channel closing the upper part of the opening of his supporting stand is not the equivalent of the vertical opening of patentee's device, because it requires a different structure and different arrangement of parts from that of the plaintiff in order to become effective. The top of defendants' stand furnishes the weight support for the container and separate means is attached to the back of the stand to hold the pump steady when in operation. It is true that defendants' channel allows the passage of the pump handle attached to the container down through the top opening of the stand, the same as the patentee's vertical opening, but this is an obvious means for such passage way.



## 2. THE RESTRAINING MEANS DIFFER.

Defendants' guide is not the mechanical equivalent of the restraining device or rest of patentee's structure. It furnishes no support for the weight of the container as plaintiff's rest does, nor does it strengthen the stand as the cross bars and legs of patentee's rest do. Defendants' guide merely prevents the wobbling of the device which in patentee's device is accomplished by the rim of the top of the stand.

If the flared stand does not fit the container with sufficient tightness to prevent wobbling, then, as testified by Mr. Schneider, a device which the "foreman of the shop figured out" [Tr. p. 103] equivalent to a hand holding something was put in

"just like two fingers holding it. Part of the pump sides in these grooves and keeps it in place. It is a guide. That pump is the part that fits right in. It holds it in place and keeps it from moving in this direction or that direction and the horizontal movement is restrained." [Tr. p. 104.]

## 3. THE STABILIZING AND SUPPORTING MEANS DIFFER.

Referring back to picture No. 5, opposite page 10, it will be seen:

On the left hand side of picture 5 is defendants' assembly with the glass container supported without the three-legged stand or any equivalent. The glass container is supported wholly by the top flaring lip of the metal stand, the same as in Oliphant. [Bk. Ex. p. 23.]

The method of stabilizing the container in the two devices is essentially different in that defendants stabilize at the back of the pump by a guide member on the side of the stand, while patentee stabilizes at the top by the outward flaring lip of the stand, preventing the container supported on the horizontal rest below from tipping or wobbling.

Mr. Kermin (patentee) says with regard to defendants' guide member:

“As used there, I would say a restraining means. Restraining the apparatus or the dispenser and container from moving. It was to keep it from wobbling—from moving in a horizontal position.

Q Which is the thing that keeps it from wobbling?

A This guard in back.

Q The device in the back end of it, or up at the top?

A The top supports it; the restraining device keeps it from wobbling; if that is the interpretation you are looking for, that is the way to interpret it.”  
[Tr. p. 81.]

Defendants' apparatus does not contain the element of claim 2 “such container being stabilized by the top of said stand at a point between the top and base of the container.” [R. p. 6, lines 54-57, 2nd Col.] Nor does it contain the element of claim 3 “said container being supported and stabilized by the additional flaring lip of said stand.” Defendants' stabilizer is the guide member.

4. DEFENDANTS FOLLOW OLIPHANT'S TEACHINGS WITH OBVIOUS MODIFICATIONS OF MECHANICAL NATURE TO ADAPT IT FOR DISPENSING MAYONNAISE.

Oliphant [Ex. Bk. p. 24], like the defendants' stand, does not have a vertical opening extending from top to bottom, but is closed at the top to furnish the support for the inverted container by the top collar.

Considering the Oliphant device, it would not involve any invention to modify this device by cutting the opening clear through the wall from top to bottom and provide other means of stiffening. Mr. Kermin testified on direct examination as to his devising his dispensing device

“but when I attempted to put the dispenser unit over it (the stand) it (the pump) stuck out so I could not get past this restriction and *naturally* I had to cut sort of an opening or channel to allow the dispenser unit to go through.” [Tr. p. 62.]

If one desired to adapt the Oliphant device to hold a container with a pump attached and the pump would not go through “naturally (he) had to cut a sort of an opening or channel to allow the dispenser unit to go through.” That is what the defendants did in their device, reinforcing it by a covering in the form of a channel, leaving the original rigidity of the upward flaring collar unaffected. Providing an additional space for the passage of an article having an extension too big to pass through the original space existing, is not invention. If making an open cut like patentee's vertical opening, weakens the wall of the stand, then obviously it should be braced in such a way as to give the necessary support.

When the pumping caused the inverted container to wobble then “the foreman of the shop figured out” [Tr.

p. 103] a groove guide for the rear of the pump to hold it steady.

The patentee and defendants developed their devices from different prior structures. The patentee started with the old hopper with its three-legged stand and pump, Ex. A, while defendants adapted Oliphant to their needs.

This Circuit Court of Appeals in a recent case used language pertinent to the present situation in *International Harvester Co. v. Killifer Mfg. Co.*, 9. Cir., 67 Fed. (2d) 54, 60, 62:

“It is logical to assume that the defendants developed their present harrow by working from this structure to the new much in the same manner that Warne worked from his prior structure to the new” (p. 60).

“. . . ‘It is not the result, effect, or purpose to be accomplished which constitutes an invention, but the mechanical means or instrumentalities by which the object sought is to be attained. Patents cover the means employed to effect results.’ *Kohler v. Cline Electric Mfg. Co.* (D. C.), 28 F. (2d) 405, 406. ‘The thing patented is the particular means devised by the inventor by which that result is attained, leaving it open to any other inventor to accomplish the same result by other means.’ *Electric R. Signal Co. v. Hall Ry. Co. Signal Co.*, 114 U. S. 87, 5 S. Ct. 1069, 1075, 29 L. Ed. 96.

In *Eaid v. Twohy Bros. Co.*, 230 Fed. 444, 447, this court also said:

‘Being a mere improvement on the prior art, McConnell is only entitled to the premise devices described and claimed in his patent, and if the devices embodied in the Chandler patent can be differentiated, it is clear that the charge of infringement cannot be maintained. Such is the well-established law.’”

III.

No Accounting Should Be Decreed.

*Assignment of Error 9.*

“9. That the court erred in decreeing an accounting in view of the undisputed fact that the stands are distributed without compensation and none of the defendants derive any direct profit therefrom and there is no showing of any damage to the plaintiff of a character recoverable in this action.”

Any damages suffered by plaintiff, although they might be irreparable in their nature, thus entitling plaintiff to the injunction, would be general damages of such an indefinite character that no recovery may be had. It was to grant some relief in just such cases as this that equity first evolved relief by injunction.

**Plaintiff Cannot Recover Profits Derived by Defendants From Sales of Mayonnaise, a Common Article of Commerce, Not Within the Monopoly Granted by Plaintiff's Patent.**

The Writ of Perpetual Injunction prohibits manufacture, distribution, use, etc., of “any apparatus exemplified by Plaintiff's Exhibit 7, or any apparatus embodying the invention claimed in claims 2 and 3, and from offering or advertising so to do, and from aiding or abetting or in any way contributing to the infringement of either of said claims of said patent.” Nothing is said concerning manufacture or sale of mayonnaise.

Defendants are free to do today what they did with impunity in the past. free to deal in mayonnaise, a common article of commerce.

The sale of mayonnaise in conjunction with the use of the dispensers is neither the subject for accounting of profits nor in effect a contributory infringement of the patent, because a common article of commerce sold for use in conjunction with a patented device is nevertheless free from the monopoly of the patent.

*Carbice Corp. v. American Patents Corp.*, 283 U. S. 27, 75 L. Ed. 819.

In *Bradford v. Belnap Motor Co.* (Maine), 105 Fed. 63, 65, 66, the court said:

“It is a well settled rule that neither equity nor admiralty will proceed for nominal damages only. . . . Equity will maintain the right to give value, but it will not, as will the common law, proceed to an assessment of damages which are vague, uncertain or nominal in amount, so that it is not improbable that, in any event, the complainant could only be entitled to an injunction.”

In *American Box Co. v. Crossman*, 57 Fed. 1024, 1029, an accounting was refused where it appeared that defendants had made no profits on account of the patented feature “and” as said by the court,

“while it is very probable that unrestricted sale would eventually seriously impair the trade of complainant, which fact is the basis of jurisdiction in this case, yet the proofs lack specific evidence of actual damage already suffered.”

In *Southern Textile Machinery Co. v. Fay Stocking Co.* (6 Cir.), 259 Fed. 243, it was held:

“In suit for infringement of patent, before any accounting is ordered for profits, as distinguished

from such damages as might be shown by any of the accepted measures, the trial court should be satisfied there is some theory of recovering profits plausible enough to justify an effort to establish it.”

In *Perkins Electric S. Mfg. Co. v. Yost E. Mfg. Co.* (N. D., Ohio), 189 Fed. 625, at page 627, the court said:

“Without going more into the detail of this situation, we are of the opinion that this is one of the cases wherein the language of the court in *Merriam Company v. Ogilvie*, 170 Fed. 167, 95 C. C. A. 423, that ‘an inquiry as to damages or profits would . . . yield no compensatory profits or damages proportionate to the cost of the investigation,’ described the situation very clearly, and that, therefore, further litigation on this subject ought not to be indulged in. An order for accounting, will, therefore, be refused.”

The decree should be reversed and judgment given defendants with costs.

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